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ANSWER TO BILL OF DISCOVERY—EFFECT AS EVIDENCE.

It is a familiar rule of chancery practice in Virginia that an answer which is responsive to the bill must be taken as true unless overcome by more than the testimony of one witness, but that it may be so overcome not only by the testimony of two witnesses, but of one witness with corroborating circumstances, or by corroborating circumstances alone, or by documentary evidence alone. *Jones v. Abraham*, 75 Va. 466. The reason on which the rule is founded is thus stated by Chief Justice Marshall in *Clark's Ex'ors v. Van Riemdsdyk*, 9 Cranch, 158, 160: "The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance."

The subject of this note is the enquiry whether the rule applies to the answer to a bill of discovery.

In order that there may be no confusion of ideas we must start with a clear conception of terms. Every suit in equity is to some extent a bill of discovery; the plaintiff always may, and usually does, call upon the defendant to disclose by his answer facts and circumstances within his knowledge, and which the plaintiff may use in support of his contention; and a reluctant defendant may be compelled to make such disclosure. But that is not what is meant now. The discovery we are to consider is the familiar branch of the auxiliary jurisdiction of the Court of Equity, which is merely an instrument of procedure, unaccompanied by any direct relief, but in aid of relief sought by the party in some other judicial controversy; that is, the technical bill of discovery, filed for the sole purpose of compelling the defendant to answer its interrogatories and thereby disclose facts within his knowledge, or to produce documents, books, or other things in his possession or control, and asking no relief in the suit, unless it be, in a proper case, a temporary stay of proceedings in another court, to which the discovery relates. 1 Pomeroy Eq. Juris., sec. 191. The importance of this distinction and necessity of keeping it clearly in view, and the consequences of not doing so, will be apparent as we proceed.

It will aid us, too, to observe that in this bill for discovery which we are to consider the suit (unless the cause is retained by the equity court, as we shall presently see) comes to an end as soon as the defendant has put in his answer containing the full disclosure and discovery which is demanded of him; nothing remains to be done but to use this answer as evidence in the judicial proceeding to which the discovery was collateral. 1 Pomeroy Eq. Juris., sec. 191.

It is the general rule in this country that upon a bill of discovery the court may retain the cause and go on to give the relief which would have been given at law. 1 Pomeroy Eq. Juris., sec. 227 *et seq.*; *Lyons v. Miller*, 6 Gratt. 427, 438. This is by virtue of the doctrine of "complete relief," of which, in Virginia, the case of *Walters v. Farmers' Bank*, 76 Va. 12, is a familiar and a conspicuous illustration. When the court of equity does so retain the cause and goes on to give the relief which the court of law would have given, it acts as a substitute for the law court, and it will give to the answer of the defendant the same effect which would have been given to it in the law court. *Lyons v. Miller*, 6 Gratt. 427, 438; *Fant v. Miller & Mayhew*, 17 Gratt. 187, 211.

What, then, is the effect which would be given to the answer in the law court? In *McFarland v. Hunter*, 8 Leigh, 489, this question was "discussed in writing and at great length," as stated by the reporter, at the July term of the court, 1834. The point arose on the ruling of the court below that "the answers of the plaintiff to the interrogatories of the defendant, so far as they were responsive, were conclusive evidence, not to be contradicted or disproved by any evidence, parol or written." The proceeding was under section 68 of the Judiciary Act of 1831, by which a plaintiff or defendant in any action at law, wishing a discovery from the adverse party to be used as evidence at the trial, was authorized to file written interrogatories to such party, and call on him to answer them on oath; and the statute declared that the answers to such interrogatories should be evidence at the trial of the cause "in such manner and to the same purpose and extent and upon the same conditions in all respects as if they had been procured upon a bill in chancery for discovery, but no further or otherwise."

The Supreme Court of Appeals, three judges sitting, after considering the matter for twelve months, decided that the answers were not conclusive, but should have such weight only as the jury should think them properly entitled to, and to be subject to be disproved by any

other evidence which the defendant might introduce. So important did the court consider the question that, at the suggestion of one of the three judges, it was re-argued before a full bench, and after another year of consideration the first judgment was unanimously affirmed. The chief opinion was written by Judge Carr, who, after an elaborate examination of the doctrine of bills of discovery, said:

“The authorities I have adduced clearly satisfy my mind that an answer to a bill of discovery is no evidence for the defendant (in a court of law) unless the plaintiff makes it so by introducing it first; and that then the whole must be read, free to be disproved by other evidence, and to be considered by the jury as its own weight shall impress them, or as other proof may affect it. And the same, I think, must be the rule as to answers to interrogatories under our statute.”

The question was before the court again in *Lyons v. Miller*, 6 Gratt. 427, 438, when the same conclusion was reached. It is not certain from the report of the case how the draftsman of the bill regarded it, but the court treated it as a pure bill of discovery in which the court of equity retained the cause and decided it. The opinion of the court was prepared by Judge Baldwin, and is worthy of its source. After saying that the effect of the defendant's answer must be determined by treating it as a matter of *evidence* and not as a matter of *pleading*, and adverting to the effect of a responsive answer in an ordinary chancery cause as evidence for the defendant, he continues a luminous discussion of the matter thus:

“A bill, however, which seeks a discovery from the defendant, in regard to a demand or defense properly cognizable at law, but which cannot be established there for want of proofs, gives to the answer of the defendant a different force and effect. The answer in such a case is to be treated as a matter of evidence, and not as a matter of pleading; and it is to be used by the plaintiff obtaining it, as evidence on the trial of the controversy, before the proper forum. According to the English practice that forum is, as a general rule, a court of common law, the chancery cause usually terminating with the discovery obtained, or the failure to obtain it. With us the general rule is the other way, the court of equity retaining the cause after the discovery has been obtained, and proceeding to give the proper relief founded upon it, instead of turning the parties over to a common law tribunal, in order that the answer may be used as evidence there; unless, indeed, the discovery was sought and obtained in order to be used in a pending common law action between the parties.

“The effect of treating the answer to a bill of discovery as evidence is, that on the trial before the proper forum, whether of law or equity, the whole of it is to be read, if used at all, as the testimony of a witness; but of a witness deposing in his own cause, and whose admissions against himself are to be taken as true, while his assertions against his adversary may be disproved or discredited, and are subject to the ordinary tests of consistency, probability, and candor, or the reverse.

The answer gains no artificial force by being responsive to the bill; nor is any part of it pertinent to the discovery to be rejected, because affirmative matter in avoidance of that which is admitted to be true. These are rules of pleading and not of evidence, and the answer to such a bill does not make up issues to be tried in the cause, but furnishes evidence to be used collaterally on trial of the common-law action, or on that which is substituted for it, when the court of equity, to prevent circuitry, expense, and delay, undertakes itself to give or refuse redress after the discovery has been made. On the common-law trial, so much of the answer as makes in favor of the defendant may be disproved by its context, or extrinsic evidence, and on the other hand may be sustained by corroborating testimony: and this is equally true of the substituted trial in equity."

The sentence at the end of the first paragraph of the above quotation—"unless, indeed, the discovery was sought and obtained in order to be used in a *pending* common-law action between the parties"—is worthy of remark before passing on. The meaning is, of course, that if a common-law action has already been brought and is pending, and the discovery is sought in aid of that action, the court of equity will decline to retain the cause, but, the discovery having been obtained, will dismiss the bill and leave the parties to the forum they have first chosen. Without attempting to decide whether the court could properly retain the cause in such a case, it would seem to be entirely logical and proper to leave it to the law court.

In *Thornton v. Gordon*, 2 Rob. Rep. 750, 757, Judge Allen said, in discussing the effect of an answer in ordinary chancery cases as evidence for the defendant, that the cases did not confine that effect to answers to bills seeking a discovery, but that "in truth the rule has no application to a mere technical bill of discovery, where no relief is prayed, but the discovery is required to be used in some trial at law; for there the plaintiff has his election to use the answer or not."

Now, from the foregoing cases two conclusions would seem necessarily to follow: 1. That on a bill of discovery, where the discovery is sought and obtained for use in a trial at law, the answer of the defendant has only the effect of the testimony of a witness, and not the effect of an answer in an ordinary chancery cause. 2. That where, under the practice in Virginia, the court of equity retains the cause and gives the relief which the law court would have given, the equity court acts as a substitute for the law court, and must give to the answer the same effect as would be given to it in the law court.

We are, therefore, wholly unprepared for the following proposition, which is from the opinion of the court in *Smith v. Smith's Adm'r*, 92 Va. 696:

"Although the only ground of equity jurisdiction alleged in the bill was the necessity for a discovery from the defendant, the court, being in possession of the cause, had the right to retain and make an end of it, and not turn the parties over to another forum, so as to produce circuity of action and expense. Where the court of equity does retain such a cause and proceeds to give the proper relief, it acts as a substitute for the court of law, and gives the same effect to the answer as would be given to it in that court, with this difference, however, it would seem, that in the court of equity, the only ground of jurisdiction being the necessity for a discovery, the complainant cannot contradict the answer, as to the matter discovered by it in response to the prayer of the bill, by other evidence, as he would thereby prove himself out of court. 2 Tucker's Com. 503; *Fant v. Miller*, 17 Gratt. 187; *Thompson v. Clark*, 81 Va. 422. The answer of the defendant in such a cause, in so far as it is responsive to the other allegations of the bill as to which no discovery is asked, is entitled to the same weight as evidence in his favor as if the bill had been filed for relief as well as discovery."

Now, in the first place, this is not only against the authorities we have cited above, but against principle as well; and if we keep in view the nature of the bill of discovery this will become manifest. It is not the object of that proceeding to obtain any relief on the merits of the controversy; it is simply a bill *to obtain evidence*; it arose out of the inadequacy of the common law, which did not permit the parties to be examined as witnesses, nor provide means to compel one party to produce documents or furnish copies thereof, however necessary they might be to the other party's action or defense. 1 Pomeroy Eq. Juris., sec. 190. The appeal to equity was, not that the court would hear the controversy and give relief, but that it would simply put forth in favor of the plaintiff its power to probe the conscience of the defendant; and in earlier times the court refused to do more than that. In later years the court in this country, and to a much less degree in England, actuated by its desire to avoid delay, expense, and circuity of action, exercised the power of retaining the cause and deciding it; but in doing that it merely acted as the substitute for the law court, giving the relief which that court would have given, and not its own peculiar remedies. It did not change the nature of the proceeding nor the effect of the pleadings; it remained as before, *a suit to obtain evidence*, but the forum to which the application was made went a step further than formerly and applied the evidence to the facts of the controversy and decided the issue, giving the same judgment the law court would have given. The effect of the answer, therefore, would be determined by treating it as a matter of *evidence*, not as a matter of *pleading*.

But not only is the decision we are examining against both authority

and principle, but it seems to be without authority; it is not sustained by any Virginia authority, although two decisions of the same court and a text writer are cited in its support. We think it can be shown that these are *dicta*—that prolific mother of judicial error. Let us examine the decisions first. The extracts to be made from the opinions will be a little tedious, perhaps, but they will be useful in showing how carefully and accurately error has trodden in the steps of error. Take the following sentence from the opinion of Judge Moncure, speaking for the whole court, in *Fant v. Miller*, 17 Gratt. 187, 211:

“Where the court of equity retains the cause and proceeds to give the proper relief, it acts as a substitute for the court of law, and gives the same effect to the answer that would be given to it in that court. *It would seem, however, with this difference, that in the court of equity, the only ground of jurisdiction being the necessity for a discovery, the plaintiff cannot contradict the answer by other evidence, as he would thereby prove himself out of court.* But in other respects the effect would be the same in each forum.”

And then the learned judge says this, which shows that all he had just said as to the effect of the answer was purely *obiter*:

“In the present case a court of equity has jurisdiction independently of the ground of discovery, and the effect of the answer as evidence for the defendants is therefore governed by the ordinary rule of equity in such a case; but if it were governed by the rule which applies to a technical bill of discovery, as laid down in *Lyons v. Miller*, *supra*, the result in this case would, we believe, be precisely the same.”

The first sentence which is quoted above from *Fant v. Miller* is taken substantially from Judge Baldwin's opinion in *Lyons v. Miller*, 6 Gratt., at page 439; but the succeeding sentence, which we have italicized, and which is the beginning of the confusion in this matter in the Virginia decisions, is not sustained by any citation of authority. It is respectfully suggested that, besides being merely *obiter*, it is based on a total failure to distinguish between the effect of the answer as to the *jurisdiction* of the equity court and its effect as to the *facts* set up in the answer. If the answer simply denies the *fact* as to which the discovery is sought, that would seem to be conclusive as to the *jurisdiction* of the equity court; the jurisdiction is based on the necessity for a discovery—that is, because the fact cannot be otherwise proved; if it can be otherwise proved the jurisdiction fails; if the answer simply denies the existence of the fact and stops there, what can the plaintiff do? He cannot prove the falsity of the answer except by proving the existence of the fact by other evidence; and if he can prove the existence of the fact by evidence other than that of the answer, he does

not need the discovery—the jurisdiction fails and his bill will be dismissed; hence the origin and the meaning of the phrase “prove himself out of court,” which, like all other paradoxes, has a kind of fascination for the mind and often contributes to intellectual confusion.

This distinction is made much clearer by the following extract from the opinion of Judge Tucker in *McFarland v. Hunter*, 8 Leigh, at p. 501:

“There is no doubt that where a plaintiff goes into equity on the ground of discovery only, his bill is dismissed if the facts charged are denied, notwithstanding the plaintiff may introduce the strongest countervailing testimony. But this is not because the answer is conclusive as to the *facts*, but because it is conclusive as to the *jurisdiction*. The court does not look into the *facts at all*. The fact that the plaintiff cannot get the discovery he seeks, puts him out of court, and the more strongly he proves the falsity of the answer the more strongly does he ‘prove himself out of court.’ . . . Moreover, even where a bill is dismissed on the ground that the answer does not afford that discovery upon which the plaintiff rests the jurisdiction of his case, if, after he is dismissed from the forum of equity, he institutes a proceeding *at law*, the decree of dismissal is no bar to his action. He may proceed (if he has evidence *aliunde*) to assert his demand.”

It would seem, therefore, that if a discovery is sought to be used in an action at law, and the answer simply denies the *fact* as to which the discovery is desired, the answer is conclusive as to the question of *jurisdiction*, and the bill must be dismissed; but the plaintiff is free to pursue the matter in the law court if he can discover any evidence which will enable him to maintain his case without calling on the defendant; the failure in equity does not affect his rights in any way. It is also plain that if the defendant had not denied the fact, but had made the discovery demanded of him, the suit in equity would have come to an end; the answer of the defendant would have been taken to the law court to be used there as evidence if the plaintiff so desired; that if used at all it must be used in whole; and that it would only have the effect of a deposition, not of an ordinary answer in chancery: that is, it would be treated as a matter of evidence, not as a matter of pleading.

Thus far the ground seems to be pretty firm under our feet. Now, then, if the bill of discovery was brought in the first instance, and the court was asked to compel the defendant to discover and then to go on and grant the relief which the law court would have given, and the court determined to do so, what effect would be given to the answer? On principle, the same effect as in the former case; it is still a matter of *evidence* only, not of *pleading*; the only difference is

that the evidence is to be used in a different forum. If, then, the answer simply denied the existence of the fact as to which the discovery is sought, it would be as conclusive on the question of *jurisdiction* here as in the former case; the plaintiff could not contradict the answer except by proving by other evidence the existence of that fact, and if he did that he would at once prove that he did not need a discovery; and since the necessity for a discovery is the sole ground of jurisdiction, the court would be at once without jurisdiction. In this sense and for this reason only can it be said that the plaintiff cannot contradict the answer, because he would thereby "prove himself out of court." It is hoped that this exposition will help to deprive this phrase of some of its power for mischief.

But let us suppose (the court retaining the cause) that the answer makes the discovery called for: what then is the effect of the answer? We have seen what would be its effect if it were used in the trial at law—it would be *evidence* only. Why should it have any greater effect in the equity court, the substituted tribunal? This is what the court says in *Smith v. Smith's Adm'r*:

"When the court of equity does retain such a cause and proceeds to give the proper relief, it acts as a substitute for the court of law, and gives the same effect to the answer as would be given to it in that court, with this difference, however, it would seem, that in the court of equity, the only ground of jurisdiction being the necessity for a discovery, *the complainant cannot contradict the answer, as to the matter discovered by it in response to the prayer of the bill, by other evidence, as he would thereby prove himself out of court.*"

It is most respectfully but earnestly submitted that the words we have italicized are the result of a misapprehension of the matter. We have already shown what is meant by "proving himself out of court": that the plaintiff can only do that when the answer fails to discover, not when the discovery is actually made. Take an illustration from this very case: The defendant was called on to discover what property of the plaintiff's decedent he (defendant) had in his possession, and the dates and amounts of the choses in action and the names of the persons from whom they were due. The report of the case does not show what was actually discovered by the answer, but let us suppose the defendant had answered that he had received a bond of A for \$500, payable to the decedent, and had collected it; this would be "matter discovered by the answer in response to the prayer of the bill"; would it be held that the plaintiff could not be permitted to show that the bond was really for \$1,000, because by so doing he

would prove himself out of court? That matter would not affect the jurisdiction at all, and it is only by disproving the necessity for the jurisdiction that the plaintiff can prove himself out of court.

The next case cited in the opinion in *Smith v. Smith's Adm'r* is *Thompson v. Clark*, 81 Va. 422. The second head-note reads: "Where, upon a pure bill of discovery, court retains and decides the cause, plaintiff cannot contradict the answer by other evidence, because plaintiff would thereby prove himself out of court." The following extract from the opinion (page 426) will serve at once to show how easy it is at times for even really good judges to confound things in their nature wholly dissimilar, and with what facility *dicta* follows *dicta*, and how much both contribute to the immortality of error. The extract cannot well be shortened:

"These unequivocal and consistent averments of the answer are to be taken as true, because responsive to the bill which calls for a discovery. Indeed, the appellee contends that the answer is conclusive, and if the alleged necessity for a discovery were the only ground of equity jurisdiction in the case this position would be well taken; for we apprehend that, if in such a case the plaintiff were permitted to contradict the answer and to prove his case by other evidence, he would thereby 'prove himself out of court.' In this respect, the rule as to the force and effect of an answer where the court of equity, to prevent circuitry, expense, and delay, retains and decides the cause, is different from that which prevails where the discovery is sought to be used in an action at law. In the latter case, said Judge Baldwin, speaking for the court in *Lyons v. Miller*, 6 Gratt. 427, 'so much of the answer as makes in favor of the defendant may (at the trial) be disproved by its context, or by extrinsic evidence, and, on the other hand, may be sustained by corroborating testimony;' and this, he added, 'is equally true of the substituted trial in equity.'

"But in the case of *Fant v. Miller & Mayhew*, 17 Gratt. 187, in which the question was discussed by Judge Moncure, who delivered the opinion of the court, the rule was declared to be as we have just stated it. He said: 'Where the court of equity retains the cause and proceeds to give the proper relief, it acts as a substitute for the court of law, and gives the same effect to the answer that would be given to it in that court. It would seem, however, *with this difference*, that in the court of equity the only ground of jurisdiction being the necessity for a discovery, the plaintiff cannot contradict the answer by other evidence, as he would thereby prove himself out of court.'

"In other words, where a cause is retained which is brought into equity on the sole ground of a discovery, and of which jurisdiction is acquired on that ground alone, the plaintiff must be content to have it disposed of in accordance with the established practice of the equity forum; that is to say, in accordance with the rule which does not permit the answer in such a case to be overturned by extrinsic evidence, since to falsify the allegation of a necessity for a discovery would defeat the jurisdiction of the court whose aid the plaintiff has invoked. 2 Tucker's Com. 503."

And then immediately follows this, which need not be followed by any comment of ours to show how much value is to be placed on the decision as to the point we are discussing; the italics are ours:

"Such, however, is not the present case. The bill alleges that a bond was executed, which has been lost, and hence the jurisdiction is not dependent on the necessity for a discovery. For courts of equity have always entertained jurisdiction to decree payment of a lost bond."

Only one other authority cited in *Smith v. Smith's Adm'r* remains to be examined, and that is 2 Tucker's Com. 503. The whole text of that author is as follows:

"When the plaintiff goes into equity only on the ground that he cannot support his claim without a discovery obtained from the defendant, the answer of the defendant is clearly entitled to credit (1 Call, 280), and would seem, indeed, to be conclusive; for if the plaintiff should disprove it, he 'would prove himself out of court,' that is, he would by his own evidence falsify his allegation which served as a ground of jurisdiction. See 1 Call, 382. See also what is said *arguendo*, 6 Munf. 545."

The citation from 1 Call is the case of *Chapman's Adm'r v. Turner*, 1 Call (280), which was a bill by a pledgor of a slave, praying to be allowed to redeem—a familiar instance of the ordinary jurisdiction in equity. All the judges delivered opinions, but only one of them, Judge Roane, said anything about a discovery, and he evidently did not imagine that the case was a *bill of discovery*. This is all he said:

"A discovery of the contract being sought from the appellees by the bill of the appellants, their answer as to this subject is clearly entitled to credit; especially when not contradicted by the written agreement, . . . and when it is merely explanatory of the transaction at and before the time that the contract was completed."

The other citation from 1 Call is the case of *Pryor v. Adams*, 1 Call (382). That was a bill to recover of the defendant a balance claimed to be due on a bond which had been paid in a depreciated currency and delivered up to the defendant upon his promise to make good the depreciation. There seems to have been some disagreement among the judges whether the case was in fact a bill of discovery. Judges Fleming and Pendleton thought that it was. Judge Roane said that "although it contains no specific prayer for a discovery of the bond in question, yet, upon the whole, by a liberal construction, it might amongst other things be considered as a bill of discovery." Certainly no such effect was given to the answer as might be inferred from Judge Tucker's text, nor anything approaching it.

The reference to 6 Munf. 545, is merely to a remark of Mr. Stanard

in the argument of the case of *Stone v. Ware & Smith*, that "there are but three classes of cases where relief is or can be sought in equity from an usurious contract or its effects *Second*, Where the contract has been carried into effect, the usurious gain paid, and the plaintiff seeks to have it refunded. . . . In the second class the bill must also be a bill of *discovery*; for the party who would *prove* his case would prove himself out of court." It is not certain what is meant by this, even as an argument; what support it gives to the text of the distinguished author we are unable to see.

In conclusion, it would seem that on a bill of discovery where the court of equity retains the cause, so far from the answer which makes the discovery being conclusive on the plaintiff as to the matters discovered, the true principle is that such answer has not even the effect as evidence for the defendant that is given to a responsive answer in an ordinary chancery cause. It is simply *evidence*; the whole of it is to be read "as the testimony of a witness, but of a witness deposing in his own cause, and whose admissions against himself are to be taken as true, while his assertions against his adversary may be disproved or discredited, and are subject to the ordinary tests of consistency, probability, and candor, or the reverse. The answer gains no artificial force by being responsive to the bill; nor is any part of it pertinent to the discovery to be rejected because [it is] affirmative matter in avoidance of that which is admitted to be true." Baldwin, J., in *Lyons v. Miller*, 6 Gratt. 427, 439.

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